IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 13, 2006 Session

CYNTHIA DIANE CHURCH v. CHARLES MICHAEL CHURCH

Appeal from the Circuit Court for Williamson County
No. 01590 Donald P. Harris, Judge

No. M2004-02702-COA-R3-CV - Filed August 1, 2006

This appeal involves a dispute regarding the classification of property in a divorce proceeding filed in the Circuit Court for Williamson County. The parties stipulated that grounds for divorce existed and that neither party would seek spousal support. They also agreed on the division of the marital estate except for the wife's interests in her family's automobile dealerships and real estate holdings. The wife asserted that these interests were gifts and, therefore, her separate property. The husband insisted that the wife's interests were not gifts and that they should be treated as marital property. The trial court, sitting without a jury, found that the wife's interests in her family's automobile dealerships and real estate holdings were gifts to the wife alone. Accordingly, the court classified the interests as the wife's separate property and declined to include them in the marital estate. Thereafter, the trial court entered an order declaring the parties divorced and awarding each party approximately equal shares of the marital estate. The husband has appealed. We have concluded that the trial court did not err in classifying the original transfer of the wife's interests in the family dealerships and real estate holdings as gifts within the meaning of the equitable distribution statute.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Robert L. Jackson and Larry Hayes, Jr., Nashville, Tennessee, for the appellant, Charles Michael Church.

Andrew M. Cate, Nashville, Tennessee, for the appellee, Cynthia Diane Church.

OPINION

I.

Cynthia Alexander and Charles Church were married in October 1974. Ms. Church[1] is one of four children and the only daughter of R.C. Alexander. Mr. Alexander is a prominent businessman who owns several automobile dealerships in and around Franklin, Tennessee. Mr.

[1]Ms. Alexander changed her surname to "Church" following the marriage in 1974.

Church, who had worked as an automobile salesman, went to work in one of Mr. Alexander's dealerships. The Churches' marriage ended in divorce in 1982; however, they reconciled and remarried in November 1989.[2] Three years later, in 1992, Mr. Alexander and Mr. Church became partners in another automobile dealership in Columbia, Tennessee. Ms. Church worked at this dealership and at other dealerships owned by her father.

In 1995, Mr. Alexander and his wife retained Joe M. Goodman, a Nashville attorney specializing in estate planning, to prepare an estate plan for them. As explained by Mr. Goodman, the "entire focus of the plan was to move assets and wealth from the older generation to the younger generation in an appropriate tax planning plan." Mr. Goodman spent the next five or six months designing a plan to transfer the Alexanders' considerable wealth to their four children while minimizing the potential tax liability on the transfer. The estate plan developed by Mr. Goodman entailed a series of interrelated transactions over the course of more than a decade.

As part of the estate plan, Mr. Goodman recommended that Mr. Alexander sell fractional interests in his automobile dealerships to his four children in exchange for promissory notes to be repaid with minimal interest over ten years. In return for shares in the dealerships, each child would execute a note payable to Mr. Alexander that required annual installment payments. While the face value of the promissory notes would be fair consideration for the dealership shares transferred, the value assigned to the shares would be set to aggressively represent the lowest possible value at which the transactions could legally take place. The children would then make the annual note payments with funds received through special distributions to them from the dealerships.

Under the plan devised by Mr. Goodman, the special distributions to the children would be set at an amount sufficient to cover both the annual installment payments on the promissory notes and all taxes the children would incur as a result of the annual distributions. The amount of the distributions would not depend on the performance of the dealerships themselves or on the children's performance as employees of the dealerships. In fact, the special distributions were to be made to Ms. Church and her brothers regardless of whether they had actually been employed by one of the dealerships during the preceding year because the annual special distributions were based on the children's status as part owners of the dealerships. Mr. Goodman ran the numbers and calculated that the annual distributions to each child should be $200,000 initially and that the amount would increase to $225,000 by the end of the note period.

Mr. Alexander and his wife decided to implement Mr. Goodman's estate plan. Accordingly, on December 28, 1995, Mr. Alexander and his four children executed stock purchase agreements and promissory notes in accordance with Mr. Goodman's recommendation, and the dealerships made the first special compensation payments to Ms. Church and her brothers of $200,000 apiece. The special compensation payments were accompanied by a letter from Dan Parsons, the Alexander family's tax accountant, directing the children how to apply the funds.[3] Even though she was

[2]The parties have two children who are now adults, and whose interests are not a part of this appeal.

[3]Mr. Parsons also prepared the required tax returns for Mr. Church, Ms. Church, and the dealerships during the period of time at issue in this appeal.

married at the time, Ms. Church deposited the 1995 special compensation payment into her own separate banking account. The following day, she sent out checks covering the principal and interest for the first installment payment on the promissory note and the federal taxes incurred as a result of the special compensation payment. All of this was done with the full knowledge and acquiescence of Mr. Church.[4] No federal gift tax returns were filed, and no gift taxes were paid, on the 1995 transfers. Ms. Church and her brothers did, however, pay federal income tax on the special distributions in 1995 and in each year thereafter.[5]

In 1999, Mr. and Ms. Alexander implemented a second component of the estate plan by establishing four grantor retained annuity trusts (GRATs) for Ms. Church and her three brothers and by setting up a master real estate partnership to own the real estate associated with the dealerships. Mr. and Ms. Alexander owned 20% of the master partnership, and the remaining 80% was owned by the four GRATs. The children's interest in a limited partnership formed prior to 1995 to hold an interest in the dealership properties was folded into the new master partnership. These transactions amounted to a pure gift from the Alexanders to their children with an aggregate present value of $240,000, of which $60,000 was attributable to Ms. Church. The Alexanders filed the requisite federal gift tax returns prepared by Mr. Goodman in connection with the real estate transfers.

The Churches' marital problems resurfaced, and their marriage began to founder. Ms. Church moved out of the family residence in September or October 2001, and she retained a lawyer and filed a divorce complaint in the Circuit Court for Williamson County. However, for some reason not apparent in the record, Ms. Church did not serve the divorce complaint on Mr. Church, and he was unaware that it had been filed. The parties remained amicable and even participated in marital counseling. Ms. Church continued to work at the Columbia dealership with Mr. Church.

Ms. Church and Mr. Alexander has a serious falling out in 2003 after Mr. Alexander came to believe that Ms. Church had embezzled $63,000 from two of the family's dealerships.[6] Ms. Church's brother, Don Alexander, explained to her that it would be in the family's best interest for her to relinquish her interest in the family's dealerships and real property holdings. At a meeting attended by the Alexander children and Mr. Goodman, Ms. Church was informed that her father was

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[4] Mr. Alexander later purchased two additional dealerships. In accordance with the estate plan, Ms. Church and her brothers obtained interests in these companies as well.

[5] In essence, Mr. Alexander loaned his children the money to purchase their interest in the dealerships and then had the dealerships make special distributions to them to repay the loans over the next ten years. This tactic did not allow the Alexanders and their children to avoid all federal taxes on the transfers, as the children paid federal income taxes on the special distributions each year. However, it did allow the Alexanders to avoid having to pay taxes on the transfers at the much higher federal gift and estate tax rate. Thus, the structure of the transactions was deliberately designed to – and succeeded in – reducing the overall tax liability on the inter-generational transfer of accumulated wealth from the Alexanders to their four children.

[6] According to Mr. Church, Ms. Church had confided to him in 1996 that she had embezzled funds from the Columbia dealership. Mr. Church decided to conceal Ms. Church's conduct from Mr. Alexander. As far as the record shows, Mr. Alexander did not become aware of Ms. Church's conduct until the second incident involving alleged embezzlement.

prepared to declare her notes in default. Since Ms. Church did not have the funds to pay these notes, she agreed to convey her holdings back to her father.

On February 6, 2003, Ms. Church and Mr. Alexander executed an agreement in which she relinquished her interest in the family dealerships and real estate holdings for a total of $2,000,000 and the forgiveness of an unspecified amount of debt. Mr. Alexander agreed to repurchase Ms. Church's dealership stock for $1,000,000, and the master real estate partnership repurchased Ms. Church's interest in the partnership itself for an additional $1,000,000, thereby effectively terminating her interest in the family dealerships and the associated properties. The agreement provided for an initial payment of $500,000 to Ms. Church with the balance to be paid in installments with interest over the next ten years by Mr. Alexander and the master real estate partnership. Ms. Church used a substantial portion of the initial $500,000 payment to purchase a new residence.

Three months later, on May 8, 2003, Ms. Church filed an amended divorce complaint in the Circuit Court for Williamson County. This time, the complaint was served on Mr. Church. Mr. Church counter-claimed for divorce, and the parties stipulated that there were grounds for divorce. In addition, they agreed that neither party would seek spousal support, and they also agreed on the classification, valuation, and distribution of most of their property. They came to loggerheads, however, over the proceeds from the February 2003 resale of Ms. Church's interests in the family dealerships and related real estate to Mr. Alexander and the master real estate partnership. Ms. Church claimed that these proceeds were separate property because she had acquired the underlying assets as a gift from her parents. Mr. Church disagreed, noting that the Alexanders had deliberately structured the transfers of the dealership and real estate interests so that they would not be considered a gift. He argued that these interests, which were acquired primarily during the marriage, constituted marital property subject to equitable distribution.

The final hearing took place on October 27, 2004. Ms. Church presented three witnesses: herself, one of her brothers, and Mr. Parsons, the family's tax accountant. She also requested that the evidentiary deposition of Mr. Goodman be admitted into evidence, and it was admitted without objection. Ms. Church, her brother, Mr. Parsons, and Mr. Goodman all testified that Ms. Church acquired her interests in the family dealerships and associated real estate by means of a gift from her parents even though gift tax returns were filed only in connection with the acquisition of her interest in the real estate holdings. Mr. Goodman explained that he would classify the acquisition of both interests by Ms. Church as "[g]ratuitous transfers subject to gift tax as appropriate." After conceding on cross-examination that the Internal Revenue Service would not consider the annual special distributions to be a technical gift under the federal gift tax statute, Mr. Goodman testified as follows: "I'm sure R.C. thought it was all a gift, but it was couched as compensation."

Mr. Church presented only two witnesses at the final hearing: himself and Mr. Alexander. They acknowledged that the transfers of the dealership and real estate interests to Ms. Church were completed pursuant to the estate plan prepared by Mr. Goodman but denied the existence of a donative intent on the part of Mr. Alexander at the time of the transfers. Mr. Church testified that Mr. Alexander was not a generous person, that he had never known Mr. Alexander to give anything of value to anyone, and that he had never heard Mr. Alexander or Ms. Church refer to the 1995

transfer of the dealership stock as a gift. He also testified that he had always considered Ms. Church's interests in the Alexander family dealerships and associated real estate to be marital property.

Mr. Alexander testified reluctantly and briefly. His entire testimony occupies less than eight full pages of the trial transcript. Mr. Alexander claimed that he transferred the shares in the dealerships to his children because he wanted them to be his partners and continue to grow the family business. He stated that from his perspective, neither the 1995 stock transactions nor the annual special distributions were gifts. On cross-examination, he acknowledged that the annual special distributions were made pursuant to the estate plan prepared by Mr. Goodman, that they were not dependent on the performance of the dealerships or his children as employees, and that he could not remember whether he ever made a special distribution to one of the children even though the child had not worked for the dealerships in the preceding year.

The trial court filed its memorandum opinion on October 29, 2004 and the final decree on November 19, 2004. The court recognized that the 1995 stock transfer was deliberately structured to avoid qualifying as a gift for federal gift tax purposes. Nevertheless, the court found that Ms. Church had acquired her interests in both the dealerships and the associated real property by means of a gift from her parents. Therefore, the trial court classified the proceeds of the sale of these interests back to Mr. Alexander as Ms. Church's separate property. The court then turned its attention to the division of the Churches' marital estate which was valued at $1,953,489. The court awarded Mr. Church property valued at $989,245 and awarded Ms. Church property valued at $964,244, including a $66,545 cash payment from Mr. Church to Ms. Church.

As an alternative basis for its division of the marital estate, the court noted that classifying Ms. Church's interests in the family's dealerships and associated real estate as marital property would not have affected the final distribution. The court noted that Ms. Church contributed solely to the acquisition and maintenance of these assets by virtue of her status as the Alexanders' daughter and that she had a somewhat limited capacity as compared to Mr. Church to acquire future capital assets and income following the divorce. Mr. Church appealed.

II.
THE STANDARDS OF REVIEW

Dividing a marital estate necessarily begins with the classification of the parties' property as either separate or marital property. *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003); *Conley v. Conley*, 181 S.W.3d 692, 700 (Tenn. Ct. App. 2005); *Anderton v. Anderton*, 988 S.W.2d 675, 679 (Tenn. Ct. App. 1998). Tennessee is a "dual property" state. *Smith v. Smith*, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002). Accordingly, property cannot be included in the marital estate unless it fits within the definition of "marital property" in Tenn. Code Ann. § 36-4-121(b)(1)(A)

(2005). By the same token, "separate property," as defined in Tenn. Code Ann. § 36-4-121(b)(2), should not be included in the marital estate.[7]

Questions regarding the classification of property as either marital or separate, as opposed to questions involving the appropriateness of the division of the marital estate, are inherently factual. *Current v. Current*, No. M2004-02678-COA-R3-CV, 2006 WL 656791, at *1 (Tenn. Ct. App. Mar. 15, 2006) (No Tenn. R. App. P. 11 application filed); *Bilyeu v. Bilyeu*, No. M2003-00294-COA-R3-CV, 2005 WL 3190338, at *3 (Tenn. Ct. App. Nov. 28, 2005), *perm. app. denied* (Tenn. June 12, 2006); 19 W. WALTON GARRETT, TENNESSEE PRACTICE: TENNESSEE DIVORCE, ALIMONY AND CHILD CUSTODY WITH FORMS § 15.3, at 324 (rev. ed. 2004) (TENNESSEE DIVORCE). Accordingly, the appellate courts review a trial court's decisions classifying property using the familiar standard of review in Tenn. R. App. P. 13(d).

Once a trial court has classified the property as either marital or separate, it should place a reasonable value on each piece of property subject to division. *Davidson v. Davidson*, No. M2003-01839-COA-R3-CV, 2005 WL 2860270, at * 2 (Tenn. Ct. App. Oct. 31, 2005) (No Tenn. R. App. P. 11 application filed). *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003) (No Tenn. R. App. P. 11 application filed). The parties themselves must come forward with competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d at 231; *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values represented by all the relevant valuation evidence. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997); *Brock v. Brock*, 941 S.W.2d 896, 902 (Tenn. Ct. App. 1996). Decisions regarding the value of marital property are questions of fact. *Kinard v. Kinard*, 986 S.W.2d at 231. Accordingly, they are entitled to great weight on appeal and will not be second-guessed unless they are not supported by a preponderance of the evidence. *Smith v. Smith*, 93 S.W.3d at 875; *Ray v. Ray*, 916 S.W.2d 469, 470 (Tenn. Ct. App. 1995).

Once the parties' marital property has been classified and valued, the trial court's goal is to divide the marital property in an essentially equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). A division of marital property is not rendered inequitable simply because it is not precisely equal, *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002), *Cohen v. Cohen*, 937 S.W.2d at 832, or because each party did not receive a share of every piece of marital property, *Morton v. Morton*, 182 S.W.3d 821, 833-34 (Tenn. Ct. App. 2005); *Manis v. Manis*, 49 S.W.3d 295, 306 (Tenn. Ct. App. 2001). The fairness of the trial

[7] The dividing line between marital and separate property frequently becomes blurred. Marital property can become separate property when one spouse gives it to the other spouse. *Kinard v. Kinard*, 986 S.W.2d 220, 232 (Tenn. Ct. App. 1998); *Hanover v. Hanover*, 775 S.W.2d 612, 617 (Tenn. Ct. App. 1989). On the other hand, separate property can become marital property when its owner commingles it with marital property and no longer treats it as separate property. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002); *Smith v. Smith*, 93 S.W.3d at 878; *Batson v. Batson*, 769 S.W.2d 849, 858 (Tenn. Ct. App. 1988). Even if property is clearly separate, the increase in the property's value during the marriage and the income from the property may be considered marital property if the nonowner spouse contributed substantially to the separate property's preservation and appreciation. Tenn. Code Ann. § 36-4-121(b)(1)(B); *Cohen v. Cohen*, 937 S.W.2d 823, 832-33 (Tenn. 1996).

court's approach is inevitably reflected in its results. *Altman v. Altman*, 181 S.W.3d 676, 683 (Tenn. Ct. App. 2005); *Bolin v. Bolin*, 99 S.W.3d 102, 107 (Tenn. Ct. App. 2002).

Dividing marital property is not a mechanical process but rather is guided by carefully weighing the relevant factors in Tenn. Code Ann. § 36-4-121(c). *Flannary v. Flannary*, 121 S.W.3d at 650-51; *Tate v. Tate*, 138 S.W.3d 872, 875 (Tenn. Ct. App. 2003); *Kinard v. Kinard*, 986 S.W.2d at 230. Trial courts have broad discretion in fashioning an equitable division of marital property, *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn. 2004); *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983), and appellate courts must accord great weight to a trial court's division of marital property, *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996); *Batson v. Batson*, 769 S.W.2d at 859. Accordingly, it is not our role to tweak the manner in which a trial court has divided the marital property. *Morton v. Morton*, 182 S.W.3d at 834. Rather, our role is to determine whether the trial court applied the correct legal standards, whether the manner in which the trial court weighed the factors in Tenn. Code Ann. § 36-4-121(c) is consistent with logic and reason, and whether the trial court's division of the marital property is equitable. *Jolly v. Jolly*, 130 S.W.3d at 785-86; *Gratton v. Gratton*, No. M2004-01964-COA-R3-Cv, 2006 WL 794883, at *7 (Tenn. Ct. App. Mar. 28, 2006) (No Tenn. R. App. P. 11 application filed); *Kinard v. Kinard*, 986 S.W.2d at 231.[8]

III.
CLASSIFICATION OF MS. CHURCH'S INTERESTS IN THE FAMILY DEALERSHIPS AND ASSOCIATED REAL ESTATE AS MARITAL OR SEPARATE PROPERTY

Mr. Church takes issue with the trial court's conclusion that Ms. Church's interests in her family's automobile dealerships and associated real estate were her separate property because she acquired them by means of a gift. He acknowledges that the $2,000,000 Ms. Church has received or will receive from Mr. Alexander and the master partnership is traceable to these interests and therefore follows their characterization as either marital or separate property. Moreover, Mr. Church concedes that if this court concludes that the trial court did not err in classifying these interests as Ms. Church's separate property, he has no viable issues on appeal.[9]

The equitable distribution statute expressly defines the terms "marital property" and "separate property." Marital property consists of "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for

[8] The manner in which the trial court divides the marital property cannot be considered without also considering the manner in which the trial court allocates the marital debt. Trial courts have not completely divided a marital estate until they have allocated both the marital property and the marital debt. *Robertson v. Robertson*, 76 S.W.3d at 341; *Hopkins v. Hopkins*, No. M2002-02233-COA-R3-CV, 2003 WL 21462971, at *6 (Tenn. Ct. App. June 25, 2003), *rev'd in part on other grounds*, 152 S.W.3d 447 (Tenn. 2004); *Anderton v. Anderton*, 988 S.W.2d at 679.

[9] In light of this concession, we need not address the trial court's alternative justification for the manner in which it divided the Churches' marital estate. However, were we to do so, we would conclude that the manner in which the trial court divided the parties' property was equitable, even if Ms. Church's interests in her family's automobile dealerships and the associated real estate were considered marital rather than separate property.

divorce," as well as "any property to which a right was acquired up to the date of the final divorce hearing." Tenn. Code Ann. § 36-4-121(b)(1)(A).

The statute then lists several categories of property it defines as "[s]eparate property" notwithstanding the fact that the property might also satisfy the definition of marital property. Tenn. Code Ann. § 36-4-121(b)(2)(A)-(F). The list includes "[p]roperty acquired by a spouse at any time by gift, bequest, devise or descent." Tenn. Code Ann. § 36-4-121(b)(2)(D). Property acquired prior to the final hearing that is traceable to separate property constitutes separate property unless it has been gifted to the marital estate or has been transmuted into marital property through inextricable commingling with marital assets. *Batson v. Batson*, 769 S.W.2d at 858; 2 JOHN TINGLEY & NICHOLAS B. SVALINA, MARITAL PROPERTY LAW § 33:2, at 33-7 (rev. 2d ed. 2006); 19 TENNESSEE DIVORCE § 15:4, at 334 & n.26. However, the income from an increase in value of the parties' separate property during the marriage constitutes marital property as long as "each party substantially contributed to its preservation and appreciation." Tenn. Code Ann. § 36-4-121(b)(1)(B).

All property acquired by either spouse during the course of the marriage is presumed to be marital property. *Runions v. Runions*, No. W2005-01954-COA-R3-CV, 2006 WL 1381516, at *3 (Tenn. Ct. App. May 19, 2006) (No Tenn. R. App. P. 11 application filed); *Hunter v. Hunter*, No. M2002-02560-COA-R3-CV, 2005 WL 1469465, at *4 (Tenn. Ct. App. June 21, 2005) (No Tenn. R. App. P. 11 application filed). However, this presumption can be rebutted by evidence that the property was a gift to one spouse alone. *Evans v. Evans*, No. W2001-03037-COA-R3-CV, 2003 WL 135053, at *6 (Tenn. Ct. App. Jan. 14, 2003) (No Tenn. R. App. P. 11 application filed); *Dunlap v. Dunlap*, 996 S.W.2d 803, 814 (Tenn. Ct. App. 1998).

In order to establish a gift, the donee must demonstrate by a preponderance of the evidence the common-law requirements for a gift, i.e., donative intent on the part of the donor coupled with delivery of the property to the donee. *Lowry v. Lowry*, 541 S.W.2d 128, 130 (Tenn. 1976); *Dunlap v. Dunlap*, 996 S.W.2d at 815; *Hansel v. Hansel*, 939 S.W.2d 110, 112 (Tenn. Ct. App. 1996).[10] It is undisputed that Ms. Church's interests in the dealerships and related properties were delivered to her at the time of the transfers and that Mr. and Ms. Alexander, the alleged donors, surrendered complete dominion and control over these interests. Accordingly, the central issue on appeal reduces to the question of whether the evidence in the record supports the trial court's finding that Mr. and Ms. Alexander possessed the requisite donative intent at the time of the transfers.

The evidence in the record provides ample support for the trial court's finding of an intent to make a present gift of the interests in the dealerships and the associated real estate when the interests were transferred to Ms. Church. Ms. Church, her brother, Mr. Parsons, and Mr. Goodman all testified that the transfers were intended to be gifts. Mr. Church and Mr. Alexander disputed this testimony, but the trial court evidently found Ms. Church's witnesses more credible on this point. We accord great weight to the trial court's determinations regarding the credibility of the witnesses

[10] *See Cunningham v. Dept. of Safety*, No. 01A01-9509-CH-00411, 1997 WL 266851, at *4 (Tenn. Ct. App. May 21, 1997) (No Tenn. R. App. P. 11 application filed) ("In order to constitute an inter vivos gift, the donor must intend to make a gift, must deliver the property to the donee, and must relinquish to the donee all rights to control the property.")

who have testified before it. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.*, ___ S.W.3d ___, ___, 2005 WL 3557837, at *8 (Tenn. Ct. App. Dec. 29, 2005).[11]

Mr. Church has presented no persuasive argument for disregarding the trial court's credibility determinations regarding the intent behind the transfers to Ms. Church. Furthermore, Mr. Parsons and Mr. Goodman both testified that gift tax returns were prepared and filed in connection with the transfer of the interests in the real estate holdings to Ms. Church. Accordingly, we conclude that the evidence in the record supports the trial court's factual finding that Ms. Church acquired her interests in the dealerships and the related properties by gift and that these interests and the proceeds from them therefore constituted her separate property.

Mr. Church raises one other objection to the trial court's gift finding. He argues that Mr. Alexander's failure to file gift tax returns on the 1995 transfer of the interest in the dealerships to Ms. Church precludes her from claiming in the divorce proceeding that this interest was acquired by gift and thus qualifies as her separate property. One might conclude from the absence of citation to any authority on this point in Mr. Church's brief on appeal that this argument presents a question of first impression in the courts of the United States. However, this is not the case. This precise argument has been raised in and addressed by numerous courts since the enactment of the first federal gift tax in 1924.[12]

Mr. Church's failure to address or even cite the cases discussing this question is reason enough for rejecting his challenge to the trial court's finding that Ms. Church's shares in the family dealerships and related real estate were acquired by gift and thus constituted her separate property. *See* Tenn. R. App. P. 27(a)(7). However, a review of the relevant case law reveals that the courts that have considered the issue have typically rejected the type of argument Mr. Church is raising here. In general, the courts treat the filing or failure to file a federal gift tax return as evidence that is relevant to, but not dispositive of, the question whether the property at issue was acquired by gift as that term is used in the state's equitable distribution statute. *See, e.g., Campbell v. Campbell*, 310 P.2d 266, 278 (N.M. 1957); *Humphrey v. Humphrey*, No. 2000-A-0092, 2002 WL 1357108, at *2-4 (Ohio Ct. App. June 21, 2002); *Brown v. Brown*, 361 S.E.2d 364, 367 (Va. Ct. App. 1987).[13] Mr.

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[11] Our deference to the trial court's credibility determinations is based on the inescapable fact that the trial court, unlike this court, observed the witnesses as they testified and thus had an opportunity to assess their credibility. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002); *Klosterman Dev. Crop. v. Outlaw Aircraft Sales, Inc.*, 102 S.W.3d 621, 635 (Tenn. Ct. App. 2002).

[12] *See Merrill v. Fahs*, 324 U.S. 308, 312, 65 S. Ct. 655, 657 (1945) ("Similar language was used in the gift tax, first imposed by the 1924 Act . . . .").

[13] *Cf. Layman v. Layman*, 731 S.W.2d 771, 772-73 (Ark. 1987):

> Mrs. Layman contends the chancellor erred in refusing to find that shares of common stock in Layman's, Incorporated, in the name of Joe Layman were marital property, finding instead that the stock was a gift to Mr. Layman from his parents. Mrs. Layman concedes the shares of nonvoting, preferred stock are separate

(continued...)

Church has failed to point us to a single case in which a court has held that a spouse is barred from claiming that property was acquired by gift and thus his or her separate property solely because the evidence showed that the donor did not file a federal gift tax return relating to the transfer.

IV.

We affirm the judgment classifying Ms. Church's interests in the family dealerships and the related real estate as her separate property and the resulting distribution of the parties' property. We remand the case to the trial court for whatever further proceedings consistent with this opinion may be required, and we tax the costs of this appeal to Charles Michael Church and his surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

[13](...continued)

> property . . . because gift tax returns were filed with the IRS in connection with the transfer of preferred stock. However, no gift tax returns were filed as to the shares of common stock and on that basis she urges it was wrong to exclude the common stock from the marital estate. But the absence of a gift tax return, while some evidence of the intent, is not conclusive of the issue. It was not seriously disputed that the elder Laymans wanted to transfer the ownership of Layman's to their two sons and all the stock transferred to Joe Layman was issued in his name alone. An accountant testified that no gift tax returns were filed because the transfers were not from one family member to another, but directly from the corporation. We find no proof from which it might be inferred the stock was acquired by Joe Layman other than as a gift from his parents.